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No. 06-160

In the Supreme Court of the United States

KEVIN MCCLAIN, GEORGE BRANDT III, AND JASON DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence seized under search warrants is admissible under the good-faith exception to the exclusionary rule, when the warrants were issued based in part on information acquired in a search that was later held invalid, but that earlier search was close enough to the line of validity to make the executing officers' reliance on the warrants objectively reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 430 F.3d 299. The opinion of the district court (Pet. App. 20a-32a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 2, 2005. A petition for rehearing was denied on March 31, 2006 (Pet. App. 33a-34a). On June 21, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 25, 2002, a federal grand jury in the United States District Court for the Middle District of Tennessee returned an indictment charging petitioners with conspiring to manufacture and to possess with intent to distribute more than 1000 marijuana plants, in violation of 21 U.S.C. 846; manufacturing and possessing with intent to distribute 1000 or more marijuana plants, in violation of 21 U.S.C. 841(a)(1); and possessing less than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a, 4a-5a. Petitioners moved to suppress evidence found during searches of their marijuana grow house. The district court granted the suppression motions. *Id.* at 20a-32a. On the government's appeal, the court of appeals reversed and remanded for further proceedings. *Id.* at 1a-19a.

1. On the night of October 12, 2001, a police dispatcher in Hendersonville, Tennessee, received a telephone call from a citizen reporting that a light was on at a neighboring house located at 123 Imperial Point. The caller stated that the house had been vacant for several weeks. When Officer Michael Germany arrived at the house shortly after 9:30 p.m., he observed that the front door was slightly ajar, with the deadbolt lock exposed, and that a light was visible through the open door. Suspecting that a burglary or other crime might be in progress, Officer Germany called for backup, and Officer Jason Williams arrived at the scene a short time later. Pet. App. 2a-3a.

Officers Germany and Williams pushed open the front door of the house and announced their presence, but they received no response. The officers then moved

from room to room in order to determine whether criminal activity was in progress. When the officers moved to the basement, they saw that the basement windows were covered with reflective paper that faced inward, and that a large room in the basement contained a substantial amount of electrical wiring that was connected to a junction box and what appeared to be plant stimulators. The basement also contained a number of boxes. The officers did not open them, but their markings suggested that they contained grow lights. Germany did not see any marijuana plants, but he suspected that a marijuana grow operation was being set up in the basement of the house. Pet. App. 3a-4a.

The following day, Sumner County Drug Task Force Officer Brian Murphy received Officer Germany's report about the incident and visited the house at 123 Imperial Point. Officer Murphy photographed parts of the property, but he did not enter the house. Officer Murphy placed the property under off-and-on surveillance and began an investigation. He determined that petitioner McClain was the owner of the property, and he came to suspect that McClain, petitioners Brandt and Davis, and a fourth person, Anthony Collins,[1] were establishing a marijuana grow operation there. Pet. App. 4a; Gov't C.A. Br. 6-7.

On November 27, 2001, Officer Murphy obtained warrants to search the house at 123 Imperial Point and five other properties that Murphy had linked to petitioners through surveillance and investigation. The warrant applications were based in part on information obtained during the initial warrantless search of 123 Imperial

[1] Collins was charged in the indictment, but his case was severed from petitioners', and he is no longer a party to this case. See Gov't C.A. Br. 3 n.1.

Point, and the affidavits supporting the warrant applications described the circumstances of the prior search. On November 28, 2001, when officers executed the warrant for 123 Imperial Point, they found a marijuana grow operation and recovered 348 marijuana plants and various types of grow equipment. Warrant-authorized searches of the other five properties uncovered numerous marijuana plants and grow-related paraphernalia. Pet. App. 4a.

2. Before trial, petitioners moved to suppress the evidence obtained as a result of the searches conducted at 123 Imperial Point. After a hearing, the district court granted petitioners' motion to suppress. See Pet. App. 20a-32a.[2] The court held that the initial warrantless search was not justified by exigent circumstances because the information known to officers Germany and Williams at the time of the search was insufficient to support an objectively reasonable belief that a burglary was in progress. *Id.* at 24a-28a. The district court also rejected the government's contention that the "good faith" exception to the exclusionary rule announced in *United States* v. *Leon*, 468 U.S. 897 (1984), barred suppression of the fruits of the November 28, 2001, warrant-authorized search. The court stated that, "[u]nlike *Leon*, this is not an instance in which the officers[] relied on a defective search warrant." Pet. App. 28a-29a.[3]

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[2] The government argued in the district court that petitioners lacked standing to contest the searches of 123 Imperial Point. The district court rejected that contention, see Pet. App. 23a-24a, and the government did not renew the argument on appeal, see *id.* at 5a n.1; Gov't C.A. Br. 8 n.3.

[3] The district court also suppressed the post-arrest statements of petitioners Brandt and Davis as fruits of the warrantless search

3. The court of appeals reversed. Pet. App. 1a-19a.

a. The court of appeals first addressed the legality of the initial warrantless search. See Pet. App. 6a-10a. The court held that the search was unlawful because the circumstances surrounding the officers' warrantless entry did "not present the type of objective facts necessary to establish probable cause that a burglary was in progress at the house." *Id.* at 8a. The court found "no evidence that [the officers] acted in bad faith," and it observed that "[s]ometimes the line between good police work and a constitutional violation is fine indeed." *Id.* at 9a. The court concluded, however, that the officers "had no objective basis for their concern that a burglary was being committed" on the night in question, *ibid.*, and that the officers' suspicions in that regard did not "suffice to overcome the presumption of unconstitutionality attached to a warrantless intrusion into the sanctity of the home," *id.* at 10a. Accordingly, the court of appeals found "no error in the district court's conclusion that the entry and search were in violation of the Fourth Amendment." *Ibid.*

b. The court of appeals further held that, notwithstanding the illegality of the October 12, 2001, warrantless search, the evidence obtained pursuant to the warrant-authorized searches of November 28, 2001, should be admitted under the *Leon* "good faith" exception to the exclusionary rule. Pet. App. 10a-14a. The court concluded that "this is one of those unique cases in which the *Leon* good faith exception should apply de-

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conducted on October 12, 2001. See Pet. App. 29a-31a. The court explained that "the Government does not identify any independent source for [the statements] that is not derivative of the warrantless search of 123 Imperial Point." *Id.* at 31a.

spite an earlier Fourth Amendment violation." *Id.* at 13a. The court explained:

> The facts surrounding these officers' warrantless entry into the house at 123 Imperial Point were not sufficient to establish probable cause to believe a burglary was in progress, but we do not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring inside [petitioner] McClain's home, and we find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home. More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and Officer Murphy's warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search. On the basis of that affidavit, the magistrate issued the search warrants. There was indeed nothing more that Officer Murphy could have or should have done under these circumstances to be sure his search would be legal. Because the officers who sought and executed the search warrants acted with good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable, we conclude that despite the initial Fourth Amendment violation, the *Leon* exception bars application of the exclusionary rule in this case.

Id. at 13a-14a (citation and internal quotation marks omitted).

c. Chief Judge Boggs concurred in the judgment but wrote separately to state his view that the initial warrantless search of 123 Imperial Point was lawful. See Pet. App. 14a-19a. After reviewing case law governing warrantless entries based on exigent circumstances, see *id.* at 15a-16a, the facts of this case, *id.* at 16a, and the alternatives available to Officers Germany and Williams, see *id.* at 16a-17a, Chief Judge Boggs balanced "the intrusiveness of the search against the exigency of the circumstance," *id.* at 18a, and concluded that "this was a situation where a common sense assessment would be that a legitimate owner, could that person have been contacted, would want the officers to investigate the possible break in," *ibid.* Based on his determination that "there was probable cause to believe that criminal activity was afoot in the house," Chief Judge Boggs would have "uph[e]ld the initial warrantless search as falling under the exigent circumstances exception" to the warrant requirement. *Id.* at 19a.

d. The court of appeals denied rehearing en banc with four judges dissenting. See Pet. App. 33a-68a.

ARGUMENT

The interlocutory ruling of the court of appeals is correct and does not conflict with any decision of this Court. Although two courts of appeals have adopted a general rule to the effect that the *Leon* "good faith" exception is inapplicable when the pertinent judicial warrant is obtained using information that is the product of a prior unlawful search, neither of those courts has specifically addressed the distinctive set of circumstances that underlay the Sixth Circuit's ruling here. Further review is not warranted.

1. Petitioners have not been tried for the offenses alleged in the indictment, and the court of appeals' decision does not resolve the merits of the criminal charges. Rather, the court of appeals simply held that evidence seized pursuant to the November 28, 2001, warrant-authorized search would be admissible at petitioners' criminal trial, and it remanded the case for further proceedings consistent with that conclusion. See Pet. App. 14a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). If petitioners are acquitted following a trial on the merits, their Fourth Amendment claims will become moot. If petitioners are convicted, they will be entitled to reassert their current challenge to the admission of the seized evidence, in addition to any other claims they may have at that time.

2. The court of appeals correctly held that the evidence obtained pursuant to the November 28, 2001, warrant-authorized search of 123 Imperial Point was admissible under this Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984). Under the "good faith" exception to the exclusionary rule announced in *Leon*, suppression of evidence seized pursuant to a search warrant is generally not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either knew was false or offered with reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his judicial role and served merely as a "rub-

ber stamp" for the police; (3) the supporting affidavit was "bare bones," *i.e.*, so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant was so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers could not reasonably presume it to be valid. See *id.* at 923. The court of appeals "agree[d] with the government that none of these factors is present in this case," Pet. App. 12a, and petitioners do not challenge that determination.

Petitioners nevertheless contend (Pet. 7-24) that the evidence obtained through the warrant-authorized search should be suppressed because the affidavit prepared by Officer Murphy in connection with the warrant application was based in part on information acquired through an earlier warrantless search that was ultimately held to be unconstitutional. The court of appeals correctly rejected that argument, concluding that "this is one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." Pet. App. 13a. The court explained that "the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable"; that "the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search"; and that "Officer Murphy's warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search." *Id.* at 14a. Under those circumstances, the court of appeals recognized, there was "nothing more that Officer Murphy could have or should have done * * * to be sure his search would be legal." *Ibid.* (in-

ternal quotation marks omitted). Because a rule of suppression in these circumstances could not reasonably be expected to affect the future behavior of persons in Officer Murphy's position, the *Leon* exception is applicable here. See *Leon*, 468 U.S. at 918 (holding that "suppression of evidence obtained pursuant to a warrant should be ordered * * * only in those unusual cases in which exclusion will further the purposes of the exclusionary rule").

Petitioners' apparent response (see Pet. 11-12) is that, although ordering suppression in these circumstances might not affect the behavior of officers (like Officer Murphy) who apply for and execute search warrants, it would nevertheless serve the purposes of the exclusionary rule by deterring future officers in the position of Officers Germany and Williams, who conducted the earlier warrantless search that was ultimately held to be unlawful. This Court, however, has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (1998). Rather, in light of the substantial costs that the exclusionary rule entails, the Court has restricted the rule's application to "those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

In the present context, the prospect that evidence seized during a warrantless search will be suppressed if the search is found to be unconstitutional is itself a substantial deterrent to Fourth Amendment violations. Where (as the court of appeals found was true here, see Pet. App. 14a) an initial warrantless search is sufficiently close to the constitutional line to support an ob-

jectively reasonable belief in its validity, the prospect that evidence seized during a later warrant-authorized search might be suppressed as well is unlikely to have significant incremental deterrent value. Cf. *Scott*, 524 U.S. at 367-368 (concluding that the prospect that unlawfully-seized evidence will be inadmissible at a parole-revocation proceeding, as well as at a criminal trial, would likely have only a minimal deterrent effect). Consistent with this Court's recognition that "the connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial," *Leon*, 468 U.S. at 911, the court of appeals correctly applied *Leon*'s "good faith" exception here.[4]

3. Petitioners' reliance (Pet. 8-10) on *Murray* v. *United States*, 487 U.S. 533 (1988), is misplaced. The Court in *Murray* held that, when incriminating evidence was observed but not seized during an initial unlawful

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[4] Petitioners assert (Pet. 12) that the court of appeals endorsed the "good faith" exception on the facts presented because of a view that "when the magistrate considered the warrant application to conduct the *second* search, he considered whether the *first* search had complied with the Fourth Amendment." That, however, is not what the court said. Rather, the court reasoned that "the facts surrounding the initial Fourth Amendment violation were 'close enough to the line of validity to make the officer's belief in the validity of the warrant objectively reasonable.'" Pet. App. 13a (quoting *United States* v. *White*, 890 F.2d 1413, 1419 (8th Cir. 1989)). The court also emphasized that the officers who sought the warrant were different from those who had conducted the antecedent search, and that the officers had disclosed the circumstances of that search to the magistrate. *Id.* at 14a. The court thus relied on the uncertainty of a prior violation and the objectively reasonable behavior of the police in seeking and executing the warrant. The police officers who conducted the warrant-authorized search therefore could and should have done nothing more to assure themselves that their search was lawful.

search, and a search warrant was subsequently obtained through information unconnected to the unlawful entry, the evidence was admissible at a criminal trial under the "independent source" doctrine. See *id.* at 536-541. The Court made clear that the "independent source" doctrine would not support admission of the evidence "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.* at 542. But the fact that the "independent source" doctrine is inapplicable here does not mean that suppression is appropriate. The Court in *Murray* did not cite *Leon*, and it did not discuss whether and under what circumstances the "good faith" exception will support admission of evidence even when a warrant-authorized search is not "independent" of an earlier illegality. Indeed, the Court did not discuss the possibility that a prior search might be so close to the constitutional line that an officer could have an objectively reasonable belief in its validity. Even the court of appeals judges who dissented from the denial of rehearing en banc in this case recognized (Pet. App. 48a) that *Murray* is "not directly on point" here.

4. As petitioners acknowledge (Pet. 19), the Sixth Circuit's resolution of the question presented here is consistent with decisions of the majority of the courts of appeals that have addressed the application of *Leon* to situations in which judicial warrants were premised on information obtained through prior unlawful searches. See, *e.g.*, *United States* v. *Diehl*, 276 F.3d 32, 43-44 (1st Cir.) (refusing to exclude evidence despite officer's presence in curtilage of house when he smelled marijuana; officer's "affidavit reflect[ed] neither deliberate mis-

statement nor any other bad faith," and his conduct was fully disclosed), cert. denied, 537 U.S. 834 (2002); *United States* v. *White*, 890 F.2d 1413, 1419 (8th Cir. 1989) (applying *Leon* where "facts [of earlier search] are close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable"), cert. denied, 498 U.S. 825 (1990); *United States* v. *Carmona*, 858 F.2d 66, 68 (2d Cir. 1988) (holding that, where officers seeking warrant acted in good faith, *Leon* exception applied despite officer's illegal seizure of cash necessary to establish probable cause for ensuing warrant-based search); *United States* v. *Thornton*, 746 F.2d 39, 49 (D.C. Cir. 1984) (finding suppression unwarranted even if antecedent search of defendant's trash was unconstitutional; judge and police officers could reasonably have believed that trash search was constitutional, and its fruits therefore could be used to establish probable cause for search warrant).[5]

As petitioners explain (Pet. 19-22), the Ninth and Eleventh Circuits have refused to apply the *Leon* "good faith" exception in some cases where information used to obtain a judicial warrant was acquired through an unlawful search. See *United States* v. *Vasey*, 834 F.2d 782, 789-790 (9th Cir. 1987); *United States* v. *Wanless*, 882 F.2d 1459, 1466-1467 (9th Cir. 1989); *United States* v. *Bishop*, 264 F.3d 919, 924 & n.2 (9th Cir. 2001); *United States* v. *McGough*, 412 F.3d 1232, 1239-1240

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[5] The same courts of appeals have sometimes declined to apply the *Leon* "good faith" exception when the officer who conducted the initial warrantless search failed to inform the magistrate of the circumstances under which that search was conducted, see *United States* v. *Reilly*, 76 F.3d 1271, 1280-1283 (2d Cir. 1996), or when the antecedent warrantless search was clearly unlawful, see *United States* v. *O'Neal*, 17 F.3d 239, 242-243 n.6 (8th Cir.), cert. denied, 513 U.S. 960 (1994).

(11th Cir. 2005). The Sixth Circuit in the instant case, however, did not hold that the *Leon* exception applies in all or even most such cases. Rather, the court stated that "this is one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." Pet. App. 13a. The court emphasized that the prior search, though unlawful, was close to the constitutional line; that the circumstances of the earlier search were fully disclosed to the magistrate who issued the warrant; and that the officers who executed the warrant-authorized search had not been involved in the prior illegality. *Id.* at 13a-14a. In none of the cases cited by petitioners did the Ninth or Eleventh Circuit discuss the application of the *Leon* "good faith" exception to that combination of circumstances.

Petitioners contend (Pet. 22) that, "[a]s a factual matter," the pertinent Ninth and Eleventh Circuit cases "were easily as 'close' as this one." The opinions in those prior cases make clear, however, that none involved the combination of circumstances that the Sixth Circuit found dispositive here. In *Vasey*, the warrant was obtained by the same officer who had conducted the initial unlawful search, see 834 F.2d at 784-785, and the officer's warrant application misrepresented the circumstances of that search, see *id.* at 790 n.4. In *Wanless* and *McGough* as well, the warrants were obtained by officers who had participated in the prior unlawful conduct. See *Wanless*, 882 F.2d at 1460-1462; *McGough*, 412 F.3d at 1233-1235. And in *Bishop*, the court treated the earlier Fourth Amendment violation as a clear one, stating that "[t]here should be little doubt" that the antecedent warrantless stop of the defendant's vehicle "was illegal and without probable cause." 264 F.3d at 924.

For the same reason, the state-court cases cited by petitioners (see Pet. 21) do not establish a conflict in authority warranting this Court's review. In *State* v. *Dewitt*, 910 P.2d 9, 11 (Ariz. 1996), and *State* v. *Johnson*, 716 P.2d 1288, 1290-1291 (Idaho 1986), the warrants were obtained by the same agents who had conducted the earlier unlawful searches. The decision in *People* v. *Machupa*, 872 P.2d 114, 123-124 (Cal. 1994), rested in part on the court's determination that an internal inconsistency in the warrant affidavit would have hindered any effort by the magistrate to assess the legality of an antecedent warrantless entry. And in *State* v. *Carter*, 630 N.E.2d 355, 362 (Ohio 1994), the officer who had performed the initial warrantless seizure "was unable to point to specific articulable facts that would lead a reasonable person to believe" that the seized individual had committed a crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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